

Providing Subsidized EHR to Physicians Under Stark and Anti-Kickback Statute

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Subsidizing EHR for Physicians: Why would I want to do that?

- Helps to further hospital/physician alignment.
- Enhances quality, efficiency and performance.
- Allows physicians to access Medicare/Medicaid incentive payments.
- ACO's are coming soon!

Stark and Anti-Kickback

What are the Stark law and the Anti-kickback statute and why do I care about them?

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The EHR Safe Harbor/Stark Law Exception – What's Required?

- EHR that qualifies includes software, information technology, training, maintenance, help desk, etc.
- Note: Hardware cannot be donated; cash cannot be given; and you cannot subsidize the staff required to input old records into EHR system.

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The EHR Safe Harbor/Stark Law Exception – What’s Required? – Cont’d

- The donated EHR items and services must be used *predominately* to create, maintain, transmit, or receive EHR. EHR software may have ancillary functions, provided that the EHR functions predominate and that the ancillary functions relate to the care and treatment of individual patients;
- The EHR software must be *interoperable* at the time it is provided to the physician. Software is deemed interoperable if a certifying body recognized by the Secretary of the Department of Health and Human Services has certified the software no more than 12 months prior to the date it is provided to the recipient;

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The EHR Safe Harbor/Stark Law Exception – What’s Required? – Cont’d

- The donor (or any person acting on the donor’s behalf) does not take any action to limit or restrict the use, compatibility, or interoperability of the items or services with other prescribing or EHR systems;
- *Before* receipt of the items and services, the *physician pays at least 15% of the donor’s cost* for the items and services (the “Physician Contribution”). The donor (or any party related to the donor) does not finance the Physician Contribution or loan funds to be used by the physician to pay for the items or services;

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The EHR Safe Harbor/Stark Law Exception – What’s Required? – Cont’d

- Neither the physician nor the physician’s practice (including employees and staff members) makes the receipt of items or services, or the amount or nature of the items or services, a condition of doing business with the donor.
- Neither the eligibility of a physician for the items of services, nor the amount or nature of the items and services, is determined in a manner that directly takes into account the volume or value of referrals or other business generated between the parties (note: taking referrals “indirectly” into account is OK);

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The EHR Safe Harbor/Stark Law Exception – What’s Required? – Cont’d

- A written agreement between the parties sets forth the costs of the items and services and other terms of the arrangement;
- The donor does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the fact that the physician possesses or has obtained items and services equivalent to those provided by the donor;

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The EHR Safe Harbor/Stark Law Exception – What's Required? – Cont'd

- For items and services that are of the type that can be used for any patient without regard to payor status, the donor does not restrict, or take any action to limit, the physician's right or ability to use the items and services for any patient;
- The items and services do not include staffing of physician offices and are not used primarily to conduct personal business unrelated to the physician's medical practice;

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The EHR Safe Harbor/Stark Law Exception – What's Required? – Cont'd

- The donor does not shift the costs of the items or services to any federal health care program; and
- The EHR contains electronic prescribing capability.

The EHR regulations became effective on October 10, 2006, and sunset on December 31, 2013.

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What Can Be Donated?

- EHR function must “predominate” – need not be exclusive function.
- Cannot provide “equivalent” or “duplicative” technology, but can provide upgrades or items or services that would (1) enhance functionality, or (2) standardize systems.
- What if physician has “equivalent” technology, but it doesn’t meet “meaningful use” under ARRA/HIT?

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How Can Physicians Be Selected?

- Can’t take their referrals “directly” into account.
- Can take their referrals “indirectly” into account.
The EHR regulations provide several criteria that, if used, will be deemed to not directly take into account the volume or value of referrals:
- *Number of prescriptions.* The total number of prescriptions written by the physician (but not volume/value of prescriptions dispensed or paid by the donor or billed to the Medicare or Medicaid programs);

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How Can Physicians Be Selected? – Cont'd

- *Size of practice.* The size of the physician's practice (e.g., total patients, total patient encounters, or total relative value units);
- *Total hours.* The total number of hours that the physician practices medicine;
- *Use of technology.* The overall use of automated technology in the medical practice (but not use of technology in connection with referrals made to the hospital);

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How Can Physicians Be Selected? – Cont'd

- *Medical staff membership.* Whether the physician is a member of the hospital's medical staff;
 - *Level of uncompensated care.* The level of uncompensated care provided by the physician;
- In addition to the criteria set forth in the EHR regulations, below are several criteria that could potentially be used.

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How Can Physicians Be Selected? – Cont'd

- Adherence to quality protocols (which may change over time).
- Community need for physician services.
- “Active” Medical Staff Membership.
- Adequate personnel within a physician’s office who can support the technology as a potential screening criteria.
- Physician specialty;

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How Can Physicians Be Selected? – Cont'd

- Physicians who are good “community citizens,” potentially determined by considering:
 - Participation in hospital quality improvement activities,
 - Willingness to serve as a trainer for other physicians,
 - Medical staff meeting attendance,
 - Prompt completion of patient charts,
 - Involvement in hospital committees,
 - Consistent use of hospital-based inpatient information technology systems,
 - Continuing medical education seminar attendance, and
 - Participation in local professional associations.

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How Can Physicians Be Selected? – Cont'd

- Physician adoption of compliance programs;
- Physician participation on hospital call panels;
- Physician participation in the Medi-Cal and Medicare programs;
- Physicians who participate in certain manage care plans;
- Medical school attended;
- Location of residency;
- Department (if the EMR technology is rolled out by department).

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Who Can Be A Donor?

- Under Stark, any entity that bills for DHS.
- Under AKS, anyone who provides services covered by a federal healthcare program and submits claims or requests for payment from a federal healthcare program.

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Determining 15% of Donor's Cost

- What if there are multiple donors to physician?
- How to determine/allocate costs?
- Direct, indirect, incremental, capital costs?
- Are different physician contribution percentages OK for different physicians?

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Donations to Medical Group

- Regulations are written as to physician recipients.
- Eligible v. ineligible physicians.
- Addressing physician additions/departures.
- Addressing individual physician compliance with standards.

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Other Laws/Issues

- Liability/Risk Management
- IRS/Tax-Exempt Organization Issues
- State Kickback/Physician Self-Referral Laws

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Implementation Models

Model One:



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Implementation Models, Cont'd

Model Two:

